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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife;
MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

PETITIONERS' OPENING BRIEF

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MATTER TO BE REVIEWED

This case involves a review by certiorari of the decision of the Supreme Court of the State of Washington of the case entitled "*Marco DeFunis, et al, v. Charles Odegaard, President of the University of Washington, et al,*" which is reported in 82 Wn.2d 11, 507 P.2d 1169. The Opinion was filed March 8, 1973 and is printed in the Petition for Certiorari, Appendix A-4.

JURISDICTION

This court has jurisdiction to review this matter on certiorari under Title 28, United States Code §1257(3). Petition for Certiorari was filed with the Washington Supreme Court May 24, 1973. This court entered an order granting certiorari on November 19, 1973.

This is a civil action drawing into question the validity of the action of the University of Washington, a public institution receiving federal assistance, whereby preference given on the basis of *race alone* to members of certain so-called "minorities" in competition for limited openings for admission to the law school resulted in the exclusion of petitioner Marco DeFunis, Jr., a better qualified general student.

This case involves the application of §1, Amendment XIV of the United States Constitution, which reads:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state may make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis supplied.)

This case further involves a challenge to the action of the University of Washington as being violative of §2000(d), Title 42, United States Code, which provides:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance."

QUESTIONS PRESENTED FOR REVIEW

The following are the questions presented for review in this case:

A. Whether the Fourteenth Amendment of the United States Constitution prohibiting states from denying persons within their jurisdiction the equal protection of the laws or the deprivation of life, liberty or property without due process of law is violated by an order of the governing authorities of the University of Washington, a state institution, giving preference *solely on the basis of race* to certain persons to the exclusion of others in competition for limited spaces available in the law school.

B. Whether a rule of the University of Washington whereby white students are required, *solely on the basis of race*, to meet different and more stringent criteria than are persons of certain other races in obtaining admission to the law school, violates the federal Civil Rights Act, Title 42, U.S.C. §2000(d), which prohibits discrimination or exclusion on the basis of race from any program or activity receiving federal financial assistance.

STATEMENT OF THE CASE*

The petitioner, Marco DeFunis, Jr. (hereinafter referred to as though he were the sole petitioner), was denied admission to the University of Washington Law School in August of 1971 for the second time in successive years (A. 50) although he had an outstanding academic record, having graduated from the University of Washington on June 19, 1970 Phi Beta Kappa and Magna Cum Laude (A. 47) and with an overall grade average of 3.62 out of a possible 4.00 (A. 47).

*References to documents printed in Appendix to Petition for Certiorari are referenced herein as: "Pet. for Cert. A . . . "

In the fall of 1971, the University of Washington Law School received 1,601 applications for admission to the law school. Under the University's enrollment limitations there were 445 positions allotted to the Law School and of these the number available for the first year class was between 145 and 150 students (A. 48).

The trial court made a finding which has been undisturbed by the Washington Supreme Court (A. 53, Pet. for Cert. A-13, Findings XXIII):

> "That some minority students were admitted to the University of Washington Law School prior to and instead of the plaintiff Marco DeFunis, Jr. with college grades and aptitude test scores so low that had they been white their applications would have been summarily denied."

The trial court further found, and this finding is undisturbed (A. 53, Finding XXIV):

> "That since no more than 150 applicants were to be admitted to the University of Washington School of Law the admission of less qualified students resulted in a denial of places to those better qualified."

In determining who should be admitted and who should be excluded, a law school admissions committee applied a university-wide policy adopted by the Board of Regents whereby members of certain so-called "minority races" were treated separately from and more favorably than general students and were not directly compared to applicants outside the minority group, but were compared only to each other (Pet. for Cert. A-12, R. 457).

The law school has adopted a policy to achieve a greater minority representation among students enrolled and to accomplish this desire the law school gave preference to Afro-Americans, Chicanos, American Indians and Philippine Americans (A. 52).

Out of 70 applicants from such minority races, 44 succeeded in receiving invitations from the University to enter the law school class (A. 52). Of the total of these 44 minority students only six had qualifications higher than the plaintiff and 38 had qualifications lower than the plaintiff (R. 52).

Marco DeFunis, Jr. applied for admission to the University of Washington Law Schol class commencing in the fall of 1970 after graduating from the University of Washington in the spring of 1970. He was not accepted but was placed on the class admissions waiting list and after waiting until late September of 1970, was denied admission to the law school for the fall term beginning in 1970. At that time plaintiff was advised that he might have a better chance of attending law school with the class entering in the fall of 1971 (A. 49).

Thereafter, during the academic year 1970-71, he attended graduate school and took 24 hours of graduate school courses. He received 21 hours of "A" and 3 hours of incomplete while working 36 or more hours per week for the Seattle Park Department (A. 49). He applied for a second time to the University of Washington Law School for admission in the fall of 1971. His admissions credentials included, in addition to the high scholastic records achieved as an undergraduate and his high one-year graduate school record, his score in his most recently conducted law school aptitude test (LSAT) of 668, which is within the *top* 7% of all law school applicants in the nation who had taken the test in the last *three years* (A. 49-50). He had taken the test on two other occasions and the average of scores was 582, which is a very high score. (A. 50). This score should have been around 600 if properly weighted

according to Professor Kummert, Chairman of the Admissions Committee (R. 493, 494).

As a prerequisite to admission, each applicant must have earned a baccalaureate degree and must have taken the Law School Aptitude Test (LSAT) (A. 48). The University had set up a law school admissions committee through subdelegation from the Board of Regents consisting of five faculty members and two students (A. 48, R. 436).

Applicants' records were subjected to a formula whereby the law school aptitude test scores for each applicant were combined with junior/senior average grades to establish a preliminary index called a "Predicted First Year Average" (PFYA) (A. 24, 50).

Students making a PFYA above 77 were almost all automatically admitted to the law school (R. 446, St. 340).

Those with PFYA scores below 74.5 were almost all automatically rejected *unless they were members of what were determined to be "minority" groups* (R. 447, St. 341).

The records of the "minority" students were divided into two piles and all those that were Black were first reviewed by a Black student member of the committee and Professor Geoffrey Crooks, who had been director of the school's Black CLEO program (A. 52-53, R. 458). The remainder of the "minority" files, essentially Chicanos and American Indians and Philippine Americans were reviewed specially by Dean Hunt (R. 458). No special privileges were given to other Asian Americans since a "sufficient number of them could be passed on the same basis as "non-minority" students" (R. 458; St. 352).

Approximately 1,000 applicant files were never reviewed by the committee at all (R. 422, St. 316). Each member

of the committee reviewed approximately 70 files (R. 459). The recommendations of the individual committee members then went to the full committee who voted on acceptance of the recommendations (R. 361). *All of the "minority applicants who were recommended were given invitations to enter the law class.*

Notwithstanding that the cutoff figure on predicted first-year averages (PFYA) below which white students were almost all automatically rejected, was *74.5* (R. 447), "minority" students were actually admitted with some of the following low PFYA scores which, in the order in which they appear in Exhibit A attached to the answers to interrogatories propounded by plaintiffs (A. 37-44), are as follows: 68.05, 71.65, 69.96, 71.97, 70.04, 72.37, 71.58, 74. 70.60, 69.21, 72.19, 71.79, 69.40, 67.71, 72.48, 71.19, 70.14, 70.23, 71.82, 72.70, 71.53, 73.57, 70.73, 73.67, 71.87, 73.84, 70.41.

White students with such low scores were not admitted, yet all of these minorities were given acceptances and none were put on the waiting list (R. 503).

Marco DeFunis, Jr. had a PFYA score of 76.23 (A-50, Pet. for Cert. A-64), under the University's calculations (which omitted consideration of nine hours of "A"), and a score of 76.56 if the nine hours were considered (R. 491).

The material available to the committee for the judgment of the students consisted of a Law School Aptitude Test score (LSAT), a copy of transcripts of all schools and colleges attended, certain letters of recommendation and the students' own statements (R. 494).

There were no personal interviews by the admissions committee (R. 127). The committee had no way of know-

ing from the files or otherwise whether the applicants were affluent or poor (R. 367). All students who were Blacks, American Indians, Chicanos or Philippine Americans were classified "minority" students and *assumed* to be deprived persons, *without any inquiry* (A. 52, Findings XXI), and even though all such "minority" students were college graduates.

The admissions committee had sent letters of acceptance to *275* students as of August 1, 1971, assuming a normal attrition among those invited to attend would reduce the group to produce a class of about 150 (A. 50, Findings XVII). Against the possibility of unusually high attrition among the group of selected applicants, the committee placed approximately *155* applications on a waiting list. Plaintiff was on this waiting list but he was advised of non-acceptance on August 2, 1971 (A 50, Findings XVII). The number of acceptances was increased to 311 by September 15, 1971 (R. 473) but did not include the plaintiff. Excluding the Asian, only *one* minority student out of *31* actually matriculated had a predicted first-year average above plaintiff's (R. 447).

Under a temporary restraining order a place was reserved for plaintiff and after the judgment of the trial court he was entered in the University Law School (A. 54, Findings XXVII). He is currently attending classes pursuant to a stay of the reversal by the Washington Supreme Court.

CONDENSATION OF ARGUMENT

Marco DeFunis, Jr. was deprived of his civil rights. He was denied the equal protection of the laws when his application for entry to a publicly operated university law

school was subjected to criteria different from and less favorable than the criteria applied to the applications of so-called "minority" students whose admission to the law school displaced and excluded him.

Plaintiff in this case was denied entry into the University of Washington Law School by reason of his *race* since persons of another race were given *special privileges* which permitted them to displace him in the competition for the limited number of spaces for entry into the law school. This constituted a violation of the federal Civil Rights Act, 42 U.S.C. 2000(d), which specifically prohibits a denial of benefits under any program receiving federal assistance on the basis of race.

ARGUMENT

A. Special Privileges and Immunities Accorded to Some Students Denied Plaintiff the Equal Protection of the Laws

Plaintiff was entitled to have his application for law school admission judged on *as favorable a basis* and by the *same criteria* as all other applicants. The failure to consider all applicants *on an equal basis* was a denial of the equal protection of the laws, contrary to Section 1, Amendment XIV of the United States Constitution, which reads in its pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or *property* without due process of law, *nor deny to any person* within its jurisdiction the *equal protection of the laws.*" (Emphasis supplied.)

The evidence in this case is undisputed that the "minority" applicants were given preferential treatment and were not even compared with "non-minority" applicants

for the purpose of determining eligibility for acceptance. Professor Kummert testified (R. 459):

> "They were simply not directly compared. We here sought *within the minority category,* those persons who we felt had the highest probability of succeeding in law school." (Emphasis supplied.)

The University, in seeking to accomplish what it termed a racial balance, gave special privileges and immunities to the *Black* students by having their files considered only by a Black Committee member and one in charge of the Black CLEO program and by permitting admissions of such students with scores so low that *had they been White they would have been summarily rejected* (A. 53).

The arbitrary use of race as a means of making certain privileges available is an impermissible classification. This court in the case of *Adickes v. Kress & Co.* (1970), 398 U.S. 144, 26 L. Ed. 2d 142, said:

> *"Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a state may not discriminate against a person because of his race, or the race of his companions . . ."* (Emphasis added)

In this case the evidence shows without contradiction that race alone was the criterion on which the special privileges were granted. No inquiry was made as to whether or not those students granted the special privileges were in fact *disadvantaged* or *poor* or had been *culturally deprived,* but the fact that they were *Black* or *Chicano* or *American Indian* alone gave them special privileges. All were college graduates (A. 48, Findings X).

Any classification by which citizens are treated unequally, in order to be constitutional must be on a rational and permissible basis. The requirements of the equal pro-

tection clause are well summarized by the quotation which the Washington Supreme Court in *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127, adapted from *Washington National Insurance Co. v. Board of Review* (NJ), 64 A.2d 443, as follows:

> "The equal protection clause means that the right of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928). While the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class. The equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed. *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459, 57 St. Ct. 838, 81 L. Ed. 1223 (1937); *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936); *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535, 54 S. Ct. 830, 78 L. Ed. 1411 (1934); *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U.S. 544, 43 S. Ct. 636, 67 L. Ed. 1112 (1923); *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921); *Smith v. Texas*, 233 U.S. 620, 34 S. Ct. 681, 58 L. Ed. 1129 (1914);

Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609, 43 L. Ed. 909 (1899). . . ."

The equal protection clause of the *Federal* Constitution bars all unreasonable preferences.

There is *nothing in the record* to show whether or not *plaintiff* DeFunis or any of the white applicants were in fact *culturally disadvantaged, poor or discriminated against*. No such inquiry was even made the basis for the discrimination that occurred in this case against them. The fact that persons were admitted to the law school through *special privilege* accorded them by reason of their *race*, the trial court found, prevented such persons as the plaintiff from being admitted.

Would anyone contend for an instant that a Black had been given equal protection of the laws if he had been similarly excluded by special privileges accorded to Whites solely by reason of their race?

Cases which indicate that race may be regarded for the purpose of *eliminating* discrimination do not say that the black race may be given *special privileges* not accorded to other races on the same terms.

In *Brown v. Board of Education*, 347 U.S. 483; 98 L. Ed. 873, 38 ALR2d 1180, this court, in holding that segregation of school children was unconstitutional, did so upon the ground that one race was not treated equally.

Equality is the touchstone of the cases construing the Fourteenth Amendment.

The court in the *Brown* case under footnote 5 quotes the following from *Struder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664;

"It ordains that no state shall deprive any person of

> life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that *the law in the states shall be the same for the black and for the white;* that *all persons whether colored or white, shall stand equal before the laws of the states. . . .*" (Emphasis added.)

Brown v. Board of Education, supra, stands for the proposition that discrimination on the basis of *race* is not permissible. The fact that the *Brown* case rectified discrimination against the colored race is not authority for allowing *special privileges* to the black race that are not available on the same terms to persons of other races.

The cases which sanction mixing of the races in schools, such as *Swan v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 28 L. Ed. 2d 554, do not deal with a comparable situation where one race is given *special privileges* not accorded to the other, but they deal only with the mixing of races. Such a *mixing* of races applies to *all races* alike.

Equality is the result that has to be attained to give equal protection of the law.

The fact that race may be recognized for the purpose of dealing with discrimination against one race does not in any sense mean that adverse *unequal* treatment may be meted out by public authorities on the basis of race.

Equal protection of the laws is written into the Constitution without any racial qualifications.

It does not follow that because in the past there has been discrimination against Negroes, that situation can be rectified by *creating* discrimination against other races.

Depriving plaintiff, who excels in all of the objective

tests, of his right to enter Law School while taking others on the basis of *different standards*, is not treating plaintiff equally or giving him the equal protection of the laws.

Permitting persons of certain races to have their qualifications tested, in the competition for spaces in the law school, by different criteria than apply to all students is according to them special privileges and immunities. This is in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution, and for that matter in this case, of Art. I, §12 of the Washington Constitution, which provides:

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

The mere fact that the 14th Amendment was originally passed to *protect* Negroes does not give Negroes *special privileges* not accorded to persons of other races. Thus in *Cassell v. Texas*, 339 U.S. 282, 74 L. Ed. 839, it was unconstitutional to give Negroes a certain quota on grand juries in proportion to Negroes on the voting list.

In *Hughes v. Superior Court of California*, 339 U.S. 460, 94 L. Ed. 985, this court held that a state could constitutionally prohibit picketing to require the hiring solely of Negro clerks. In so holding the court said:

> "To deny California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, Poles in Buffalo, of Germans in Milwaukee, Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, etc. through the whole gamut of racial and religious concentrations in various cities."

The Washington Supreme Court in sustaining the practice of the University of Washington of giving preferential treatment in admission to the law school to so-called "minority races" stated its position in its opinion set out in the Petition for Certiorari, Page A-21 as follows:

> ". . . the denial of a 'benefit' on the basis of race is not necessarily a *per se* violation of the Fourteenth Amendment, if the racial classification is used in a compensatory way to promote integration."

The Washington Supreme Court thus sanctioned the deprivation of rights of an individual who is to be displaced on the basis of his race (white) to accomplish a racial classification to bring about what it considers a desirable end.

The rights guaranteed by the 14th Amendment are personal to the individual. This court in *Shelley v. Kraemer*, 334 U.S. 1, 22, said:

> "The rights created by the first section of the Fourteenth Amendment are by its terms guaranteed to the individual. The rights established are personal rights."

When DeFunis was denied admission to the law school by the operation of the *policy of preferring Blacks*, he was subjected to discrimination and this was not benign discrimination insofar as he was concerned.

The personal right guaranteed him by the 14th Amendment was that no citizen or class of citizens should have special privileges or immunities which on the same terms did not belong to him.

The proposition that the individual's rights can be sacrificed so flagrantly in the interest of achieving racial balance is contrary to every concept of the guarantee of individual rights.

The facts with regard to discrimination are not obscured in the Opinion of the Washington Supreme Court but are frankly recognized. The Washington court says in its Opinion (Page A-27 Appendix A, Petition for Certiorari):

> "However, the purpose of the racial classification here is to give *special consideration* to those racial minority groups which are underrepresented in the law schools and legal profession, and which cannot secure *proportionate representation* if strictly subjected to the *standardized* mathematical criteria for admission to the law school."

Of course all white students were subjected to the standardized mathematical criteria for admission. It is a special privilege for the selected minorities to be so separately treated. This was not the according of "equal protection" to DeFunis who was excluded by reason of the *special privileges* given to so-called "minorities."

The Washington Supreme Court undertook to justify the discrimination on the grounds that it was an act of classifiication for the accomplishment of an *overriding state interest.*

The proposition that one can be classified out of fundamental constitutional rights is startling.

The doctrine of *overriding state interest* as applied by the court in this case is a new concept and a dangerous one. In this case the *finding of a compelling state interest* has been held to allow the *disregard of the constitutional guarantees* even though there has been *no declaration of such compelling state interest by the Legislature* or by the Constitution.

Making the "selected minorities" a separate class to have the privilege of being judged by more favorable criteria

than the plaintiff was a direct denial of the equal protection of the laws.

If there is a principle that under the Constitution members of the majority race may be denied equal treatment for the benefit of members of minority races, this court has not heretofore enunciated it.

On the contrary, this court has repeatedly stated that the equal protection clause of the 14th Amendment is applicable to *all* races alike. In *Brown v. Board of Education,* 374 U.S. 483, 98 L. Ed. 873, this court, under Footnote 5, quotes the following from *Struder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664:

> "It ordains that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that *the law in the states shall be the same for the black and for the white; that all persons whether colored or white, shall stand equal before the laws of the states* . . ." (Emphasis supplied.)

For the person whose rights are sacrified to achieve the so-called "overriding state interest" it is little compensation that in the philosophy of someone a social end is being promoted.

There is involved in this case a matter as fundamental as whether the individual constitutional rights of a citizen are so fragile that they can be swept aside whenever a divided state court choses to call an objective an "overriding state interest."

How does an objective become an overriding state interest? Is it such simply because a majority of a divided court gives it that name? Is it a matter of semantics whether the constitutional protections are inviolate?

Surely a state interest to be so overriding as to overwhelm the guarantees of the Constitution must be backed by some determination of some legislative or constitutional-making process or by necessary implication from constitutional responsibilities to preserve the nation or ward off danger.

We submit that an overriding state interest is not established by merely showing that there is a desirable result to be obtained.

This court has held that a reasonable relationship to a desirable state interest is not sufficient to justify taking away guaranteed constitutional rights but something extreme and compelling and constituting a clear and present danger is necessary to meet the test when we are speaking of depriving citizens of rights guaranteed under the Constitution. This principle was stated by this court in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530, 89 L. Ed. 430, 440, 65 S. Ct. 315. No such abuse or danger has been advanced in the present case."

The right to classify is an attribute of governmental authority up to the point that it begins to encroach upon the rights of citizens guaranteed by the Constitution. Whenever a classification is based upon race it is suspect. *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010. That

kind of classification must meet a test much greater than merely whether it is reasonably related to legitimate public purposes. If the citizen is to be deprived of a guaranteed right it must arise from a compelling or overriding reason, not merely because it is related to a policy that by a majority of the court is deemed desirable.

It could scarcely be contended that failure to accomplish the objective of increasing the number of minority lawyers, regardless of qualifications, threatens the public safety or welfare.

While the equal protection clause does not require in every case an absolute mathematical equality in the application of the laws, this court on numerous occasions has reiterated the fact that it takes an *overwhelming necessity* to permit a person to be classified out of his constitutional rights. Such necessity is not established lightly.

In *Thomas v. Collins*, 323 U.S. 516, 89 L. Ed. 430, this court discusses the type of necessity that will permit a citizen to be classified out of his rights:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. Irvington*, 408 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146; *Cantwell v. Connecticut*, 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 ALR 1352; *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United*

States v. Carolene Products Co., 304 U.S. 144, 152, 153, 82 L. Ed. 1234, 1241, 1242, 58 S. Ct. 778.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but *by clear and present danger*. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." (Emphasis ours)

It will be noted from the foregoing quotation that the court points out that the rational connection between a remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice where an individual is to be deprived of a guaranteed constitutional right.

The philosophy of the Washington court to the effect that an individual can be deprived of his constitutional right to equal protection and equal treatment because of what it calls "overriding state necessity" is comparable to a philosophy that would allow the uncompensated taking of private property for public use because a public purpose might be served.

This philosophy is too dangerous to countenance.

If equal protection of the laws can be denied to a citizen on the basis of an overriding state interest, then with equal facility upon the finding of an "overriding state interest," all other rights guaranteed by the Declaration of Rights in our Constitution can be disregarded and persons can be deprived of life, liberty and property without due process of law (Amendment XIV §1). They can be deprived of the right to exercise religious freedom (Amendment I); they can be subjected to unreasonable searches and seiz-

ures (Amendment IV); they can be deprived of the right of habeas corpus (Article I, §9, ¶2); they can be deprived of the right to petition and assemble (Amendment I); and they can be subjected to cruel and unusual punishment (Amendment VIII).

We submit that a state court merely by using some magic words such as "overriding state interest" should not be permitted by this court to disregard the positive protection of the Constitution that no person shall be deprived of life, liberty or property without due process of law or be denied the equal protection of the laws.

The determination by the Washington Supreme Court that there is an overriding state necessity to increase the number of Black lawyers before the bar is a philosophical determination made by a majority of the court and is by no means concurred in by all of the best thinkers and writers on the subjects of social science or legal education. In this connection we cite the article in 119 University of Pennsylvania Law Review 351 (1970) by Professor Lino A. Graglia, from which we extract and quote:

> "I do not know that Negroes do or should prefer that their attorneys be Negroes, or that Negro attorneys can more effectively represent their interests. To assume, accept, and even urge, otherwise seems to me to verge upon racism, to use that most common and forceful of epithets. Achievement of proportional representation of different groups is not a proper goal of higher education. It seems a small step from this to the argument (not unknown in our past) that certain groups are overrepresented in various professions.
>
> "Society needs the best lawyers it can get, regardless of racial or ethnic derivation. The need of culturally or economically disadvantaged groups is the same: the best representation they can get. This representation can and does come from all races. Similarly, effective

leadership both in democratic ideal and in fact does not require racial identity of the leader and the group, as Senator Brooke of Massachusetts demonstrates. Nor are the problems of poverty and of racial and ethnic discrimination solely or even distinctively matters of concern for members of minority groups; they are inescapably the most important problems for us all, and particularly for all lawyers."

This well reasoned article goes on to say:

It is further argued that minority group lawyers are important beyond their individual merits because of their visibility—they are living evidence that minority group members can advance and participate in all levels of our society. I agree, but only insofar as the minority group lawyers are effective, able lawyers, the equals of their 'majority group' peers.

"The abstract question whether Negroes can compete and succeed in this country has, I believe, been answered in the affirmative; there are few positions short of President and Vice President that Negroes have never attained. At the very highest level of the legal profession, the United States Supreme Court, Negroes are 'represented' almost exactly in proportion to their share of the population.

"Ineffective minority group lawyers will disserve the cause of minority group equality and recognition. In the short run disserving the interests of their clients, they will in the long run reinforce stereotypes of incompetence. It will soon come to be believed that to get a *real* lawyer he had better be very white.

"The point is important on a much wider scale: one of the most serious disservices done by lowered academic standards for Negroes in institutions of higher learning is to call into question the legitimacy of every Negro graduate. Neither individuals nor institutions should become accustomed to believe that Negroes cannot meet usual standards."

For a somewhat similar view see "Equality in an Unequal World" by John Kaplan, Professor of Law, Stanford University, 61 Northwestern Law Review 363.

We do not mean to imply that what we have just quoted is the unanimous opinion of scholars, but rather to point out that the very objective which the Washington Supreme Court said to be an "overriding state interest" is extremely controversial.

The determination of the necessity for achieving such an end is actually a *policy decision* with respect to which courts are ill-equipped to deal.

The determination by the Washington Supreme Court that the need to increase the number of Black lawyers was an overriding state interest was *not based upon testimony* in the case but was simply the philosophical conclusion of a majority of the divided court. The result was not because of judicial precedent establishing such a purpose to be overriding and there is respectable authority from writers on the subject that the giving of special preferences to some races to the exclusion of others is a *divisive* rather than a unifying social force. We quote the following from the article by Professor John Kaplan, Professor of Law, Stanford University, entitled "Equality in an Unequal World," 61 Northwestern Law Review 363, 375:

> "More important even than the abstract justice of such preference is the effect it would have on American society. Regardless of whether a sophisticated analysis can show that the Negro is entitled to job preference at the expense of the rest of the underclass, it is most unlikely that the Negroes' competitors will agree. Quite the contrary, it is clear that any attempt to secure preferential treatment for Negroes in the employment area will be extremely divisive.
>
> In addition to the previously-mentioned groups, whose economic well-being is not perceptibly better than the Negro's, those most affected by job preference for the Negro would be the second generation

Americans and the poor whites who have most bitterly resented his march toward equality. A major factor which has tended to weaken this opposition is our ethic that men are entitled to be treated on their individual worth alone.

It is one thing to tell those in job competition with the Negro that because of this principle they can no longer enjoy an advantage which they (or, more likely, others) had previously enjoyed; it is very different to tell them that this principle must now be modified to put them at a disadvantage. Those who will feel the pinch most strongly have not only not benefited from the exploitation of Negroes, but may in fact have been harmed by it—if only because this caused a depression in their own wage rates.

In terms of education and training, as well as any other measurable standard, the members of the rest of the underclass are no better off than most Negroes; to attempt to give Negroes formal legal preference over them will only exacerbate what is already a serious source of tension. It has been argued that the poor Negro can move forward only by creating new alliances with poor whites. It is hard to think of a better way than preferences to prevent this."

We cite the foregoing as an illustration of the fact that there is no unanimity among profound thinkers as to the beneficent results of displacing whites by giving preferences to Blacks.

The basis upon which the Washington Supreme Court has decided this case on a doctrine of overriding state interest is so dangerous that this court should not allow it to stand.

The expressive statement of Mr. Justice Jackson in his dissent in *Koramatsu v. United States*, 323 U.S. 214 (1944) well states the case against expanding the doctrine of overriding state interest:

> "Much is said of the danger of liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding military commander may revoke it all. But once a judicial opinion rationalizes such an order to show it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply into our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limits of its logic.'"

There is no evidence in this case that DeFunis was guilty of any past discrimination against Blacks or that he was in any way responsible for having placed them in any position of inequality.

Past inequities are not remedied by creating new inequities to be visited upon individuals in the non-minority groups.

This is not a case where the court found that the disregard of a certain section of the Constitution was necessary to give effect to another section. It was not a case where the legislature had adopted a policy to effectuate a constitutional mandate. It was not a case where the public safety, health or welfare is jeopardized to bring it within

the police powers. It is not a case made necessary by the exercise of the war powers. It is simply an application of a divided court's own determination that a certain result is in the interest of the state.

The Washington court has called it "overriding" or "compelling" but in effect the court by the doctrine applied in this case would set itself up as a super-legislature, overriding the Constitution when a result the majority of the court considers desirable is to be achieved.

The doctrine of compelling state interest has heretofore generally been applied not to set aside constitutional guarantees but rather to place limitation on laws or state acts otherwise authorized if the constitutional guarantees are jeopardized.

In *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274, this court said that to determine whether a law violates the equal protection clause the court must look to three things: (1) the character of the classifiication in question, (2) the individual interests affected by the classifiication and (3) the governmental interests asserted in support of the classifiication.

It will be noted that the government interest is not the only thing taken into consideration. In addition to considering the character the *individual interests* affected by the classification. In the present case, if the establishment of a class of minority citizens who can have the privilege of entering the University Law School on more favorable terms than citizens generally is accepted, then the interests of the individual who is excluded have been disregarded and swept away.

In the cases where the doctrine of compelling state interest has heretofore been used, it has generally been used as

a shield to protect the citizen against deprivation of his constitutionally guaranteed rights, not as a sword to take away these rights.

In this case the Washington Supreme Court undertook to use "compelling state interest" as a means of taking away DeFunis' rights to treatment equal to that accorded the selected minority groups.

The doctrine of compelling state interest is not one to dispense easily with constitutional guarantees of citizens but comes into play in *extreme* cases only and where a clear and present danger threatens.

In this case there is no evidence that there exists any such grave abuse which would justify depriving DeFunis of consideration as favorable as that given to the selected so-called "minority races."

B. The Exclusion of DeFunis on the Ground of Race Was a Violation of the Federal Civil Rights Act

The University of Washington is heavily funded by federal assistance of various kinds. These include the federally funded CLEO program referred to from time to time in this case (R. 505, Finding XXII A 52), the Upward Bound program (R. 333), the land grants authorized by § 17 of the Washington State Enabling Act, 25 Stat. Ch. 180, p. 676, and various other educational and research grants.

As a federally assisted institution the University falls directly within the terms of Title 42 U.S.C., § 2000(d), which provides:

> "No person in the United States shall on the ground of *race*, color or national origin be *excluded from* participation in, be denied the benefits of, or be subjected to *discrimination* under any program or activity receiving federal financial assistance." (Emphasis supplied.)

DeFunis was *excluded from* the University of Washington Law School by reason of his race since persons of other races were on the ground of race alone given special privileges which permitted them to displace him in the competition for the limited spaces for entry into the law school.

The statute quoted is a part of the Federal Civil Rights Act. That act is not written in terms of its beneficiaries being Black, but applies to *all races* and specifically prohibits a denial of benefits of any program receiving federal assistance on the *ground of race.*

Since the law school does receive federal assistance and plaintiff has been denied the benefit of having his application considered on terms as favorable as those of members of certain other races, the Federal Civil Rights Act has been directly violated by the University in this case and DeFunis has been *deprived of his civil rights.*

The acceptance of federal funds by the University bound the University to compliance with the section of the Civil Rights Act quoted. *Bossier Perry School Board v. Lemon,* 370 F.2d 847, Cert. Den. 388 U.S. 911, 18 L.Ed.2d 1350.

The Civil Rights Act is available to *all* races, not just to Blacks. In *General Presbyterian Church v. Black Liberation Front* (1969), 303 F. Supp. 894, the court says:

> "While the Court recognizes the fact that these statutes were passed primarily to insure the rights of non-white Americans, nothing in the statutes limit their application to cases where the civil rights of non-whites are being violated. Indeed, it would be unfair to deprive white Americans of the benefit of these sections when their constitutionally-protected rights are being violated. In two recent cases dealing with related issues, the Supreme Court said:

> " 'We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language.' *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437, 88 S.Ct. 2186, 2202, 20 L.Ed.2d 1189 (1968); *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966).
>
> "These statutes have been interpreted to apply to discrimination against whites as well as those of other races. *Kentucky v. Powers*, 139 F. 452 (Cir.Ct.L.D. Ky. 1905)."

The denial to the plaintiff of the right to have his application considered on a basis as favorable as persons of other races violated his civil rights.

The exclusion of DeFunis from the law school on the ground of race was a direct violation of the Federal Civil Rights Act, Title 42 U.S.C., § 2000(d), and was a violation of his right to equal protection of the laws under the 14th Amendment to the Federal Constitution.

CONCLUSION

Marco DeFunis, Jr. was denied the equal protection of the laws in violation of § 1 of the 14th Amendment of the United States Constitution and was excluded from the benefits of a federally assisted program on the basis of race.

The decision of the Washington Supreme Court should be reversed and the judgment of the trial court which ordered the University of Washington Law School to accept DeFunis as a student should be reinstated.

Respectfully submitted,

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